

THE EXPERT AGENCY AND THE PUBLIC INTEREST: WHY THE DEPARTMENT OF JUSTICE SHOULD LEAVE ONLINE OBSCENITY TO THE FCC

Robert K. Magovern*

I. INTRODUCTION

On June 6, 2002, Attorney General John Ashcroft called the Internet a "double-edge sword."¹ Although Ashcroft acknowledged that the Internet offers boundless educational, cultural, and creative capabilities, he also observed that it nonetheless exists as the "most pernicious medium for obscenity."² During the *Federal Prosecutors' Symposium on Obscenity*, Ashcroft affirmed that as a society, Americans overwhelmingly support the vigorous enforcement of federal laws against Internet obscenity.³ Indeed, a 1998 survey on First Amendment indecency doctrine found that obscenity and indecency on the Internet is a concern of eighty-five percent of all Americans.⁴ At the Obscenity Symposium, the Office of the Attorney General confirmed that it is committed to

"bring[ing] the full weight of the Department of Justice to fight against [online] child pornography and obscenity."⁵

Even before the Justice Department's recent commitment, Congress recognized the growing problem of Internet obscenity and attempted to draft legislation that was aimed at regulating sexually explicit material on the Internet. Ultimately, Congress' goal was to hold web publishers criminally accountable for any obscene speech disseminated over the Internet.⁶ After several attempts to pass legislation, however, Congress nonetheless failed to regulate the Internet due to a combination of two factors: a comprehensive disregard for constitutional rights and a lack of insulation of our elected officials from the political process.⁷

Obscene and indecent material on the Internet is quickly growing into a virtual epidemic.⁸ Be-

* The author would like to thank Andrea Ottomaneli, Dan Lee, and William Silva for their guidance and support.

¹ Memorandum from Attorney General John Ashcroft, to the Federal Prosecutors' Symposium on Obscenity (June 6, 2002) [hereinafter Ashcroft Memo] (on file with author) ("On the one hand, [the Internet] is an amazing tool that [gives] children . . . access to cultures and ideas that are beyond their everyday experiences. On the other hand, it also serves as a conduit for child exploitation and obscenity that respects no boundaries and recognizes no jurisdictional lines.").

² *Id.* ("Obscenity invades our homes persistently through the mail, phone, VCR, cable TV, and now the Internet Never before has so much obscene material been so easily accessible to minors.").

³ *Id.* (suggesting most Americans do not want their homes "besieged by an avalanche of obscenity" and that because of the inherent danger online obscenity poses to children, parents have become more vocal about developing a solution to fight obscenity in cyberspace).

⁴ Kelly M. Doherty, *WWW.OBSCENITY.COM: An Analysis of Obscenity and Indecency Regulation on the Internet*, 32 AKRON L. REV. 259, 265 (1999) (citing Brian M. Werst, *A Survey of the First Amendment 'Indecency' Legal Doctrine and Its Inapplicability to Internet Regulation: A Guide for Protecting Children from Internet Indecency After Reno v. ACLU*, 33 GONZ. L. REV. 207, 209

(1998)).

⁵ See Ashcroft Memo, *supra* note 1; see also Joe Obenberger, *Ashcroft's Porn War*, J.B. Obenberger & Associates LLP, at <http://www.melonfarmers.co.uk/inash.htm> (last modified July 14, 2002) ("The attendance [at the National Cybercrime Law Conference in Chicago] was overpoweringly dominated by FBI agents, Assistant U.S. Attorneys, and other prosecutorial and law enforcement personnel I surprisingly found myself in the midst of the anti-porn camp as they . . . discussed their order of battle.").

⁶ Mark C. Alexander, *The First Amendment and Problems of Political Viability: The Case of Internet Pornography*, 25 HARV. J.L. & PUB. POL'Y 977, 978 (2002) (stating that as Internet pornography has come to epitomize societal ills, Congress has failed the American people by attempting to federalize regulation of sexually explicit material on the Internet).

⁷ *Id.* at 977-978 ("In seeking politically expedient symbolism without regard to the Constitution, Congress has failed [at regulating pornography on the Internet].").

⁸ See Declean McCullagh, *Ashcroft's Hard Line on Hardcore*, WIRED NEWS, at <http://www.wired.com/news/politics/0,1283,44398,00.html> (last modified June 9, 2001) (reporting that a number of Republicans in the House Judiciary Committee asked Ashcroft to prosecute online obscenity). Rep. Bob Goodlatte (R-VA) was apparently the most persistent, claiming that the failure of the Clinton administration to en-

tween 1998 and 2000, the estimated number of pornographic websites rose from 28,000 to over 60,000.⁹ A study performed by *Computer World* found that the number of individual visitors to porn sites recently jumped more than 30 percent, from twenty-two million visitors in December 1999 to twenty-eight million in February 2001.¹⁰ It is estimated that Internet porn nets approximately two billion dollars per year, which helps make the porn industry in the United States more profitable than the National Football League, National Basketball Association, and Major League Baseball combined.¹¹ Using the parameters set forth by the Constitution and further articulated by the United States Supreme Court, the regulation of obscene or indecent speech has been viewed as a substantial government interest.¹² The Department of Justice appears to be using the very same roadmap that led Congress astray.¹³ Constitutional regulation is possible, but its success will depend on who bears the responsibility of its enforcement.¹⁴

Established by the Communications Act of 1934 to regulate interstate and international communications by radio, television, wire, satellite and cable, the Federal Communications Commission ("FCC") is an independent United States govern-

ment agency¹⁵ directly responsible to Congress.¹⁶ This comment will provide an overview of Congress' unsuccessful attempts to create laws that regulate the Internet, and it will explain how the Department of Justice is ultimately headed towards the same fate. Further, it will suggest how Congress can use the Federal Communications Commission to enact lawful regulations and to provide an effective means to control the spread of obscene material in cyberspace.

In any effort to control the dissemination of content over the Internet, it is vital to understand how the medium works and how it has progressed since its origin. Thus, Part II will provide both a brief history of the Internet and will discuss the current state of this medium. Developing regulations that potentially prohibit certain forms of speech requires an understanding of how the Supreme Court has traditionally treated obscene and indecent speech within different forms of media. Therefore, Part III will outline the laws of obscenity and indecency, and will attempt to further define and apply those laws in a virtual world. Part IV provides an overview of the First Amendment and further details how the Supreme Court has developed medium-specific First Amendment rules. As part of this discussion, this comment will

force obscenity laws has led to a proliferation of both on and off line obscenity. *Id.* Goodlatte supported Ashcroft's decision to use Department of Justice resources to "combat this cyberattack on our nation's children." *Id.*

⁹ See Alexander, *supra* note 6, at 981; see also Paul Lomartire, *It's a Dirty Business (And You'd Be Surprised Who's In It)*, THE PALM BEACH POST, Aug. 15, 2002, at 1 (interviewing William Lyon, executive director of the Free Speech Coalition). When asked how many porn websites were on the Internet, Lyon responded: "If I had to guess, I'd say 500,000, and 10 more are starting up as we speak." *Id.*

¹⁰ See Juleka Dash, *Former Dot Com Workers Find Home at Porn Sites*, COMPUTER WORLD, at www.computerworld.com (last modified June 11, 2001) (citing a Jupiter Matrix study on porn site web traffic).

¹¹ Lomartire, *supra* note 9 (citing a May 2001 New York Times report that estimates U.S. consumers spend between \$10 billion and \$14 billion annually on pornography). The amount spent on pornography in the United States includes Internet porn as well as hotel, cable, movies, DVDs, phone sex, adult toys, and magazines. *Id.*

¹² See *Paris Adult Theater v. Slaton*, 414 U.S. 881 (1973) (holding that states have a long-recognized legitimate interest in regulating the use of obscene material in local commerce and in all places of public accommodation, as long as these regulations do not run afoul of specific constitutional provisions); *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 378 (1971) ("In an unbroken series of cases extending over a long stretch of this Court's history it has been accepted as a postulate that the primary requirements of de-

cency may be enforced against obscene publications.").

¹³ McCullagh, *supra* note 8 (discussing how Representative Bob Goodlatte and other House conservatives supported both the Department of Justice's plan to attack Internet pornography as well as the Communications Decency Act, which the Supreme Court deemed unconstitutional in 1997 because it violated the First Amendment right to free speech).

¹⁴ Alexander, *supra* note 6, at 977 ("Internet pornography shocks the public and demands attention from politicians, yet it also enjoys a clear measure of constitutional protection. Like other incendiary issues from generations past, Internet pornography poses a political riddle: where is the intersection of political liability and constitutional legitimacy?").

¹⁵ See 47 U.S.C. §151 (2001) ("[F]or the purpose of . . . centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the 'Federal Communications Commission,' which shall execute and enforce the provisions of this chapter.").

¹⁶ See Federal Communications Commission, *About the FCC*, at <http://www.fcc.gov/aboutus.html> (last visited Sept. 10, 2003) ("The [Federal Communications Commission] was established by the Communications Act of 1934 and is charged with regulating interstate and international communications by radio, television, wire, satellite and cable. The FCC's jurisdiction covers the 50 states, the District of Columbia, and U.S. possessions.").

analyze how Internet content should be protected within this structure. Parts V and VI will discuss previous Congressional attempts and the Attorney General's recent mandate to regulate online obscenity and will look at how both approaches yield to problems of "political theater" and unconstitutionality. Finally, Part VII will illustrate how Congress and the FCC should work together to ensure that lasting legislation is not only created, but also enforced by a government agency that has relevant expertise regarding both the law and the technology. This comment ultimately seeks to address how Congress can give the "expert agency" the ability to protect the public's interest in fighting online obscenity and indecency by assuring that the legislative mistakes of the past are not repeated.

II. THE HISTORY AND DEVELOPMENT OF THE INTERNET

A. Brief History of the Internet

In the 1960s, the Department of Defense designed a project called the Advanced Research Project Agency Network ("ARPANET") wherein it sought to enable computer communication between government officials and universities via overlapping channels.¹⁷ The Department linked a series of computers together and created a network using phone lines that was so strong that it was designed to withstand a nuclear attack.¹⁸ The project's purpose was to provide a means of communication between government officials and researchers in the event that the government's computer network was damaged by a natural disas-

ter.¹⁹ ARPANET was designed to be a self-maintaining network that automatically re-routed government communications without the need for human intervention if certain links became unavailable.²⁰ However, without manual assistance, neither the sender nor the receiver of information would know the location of the other²¹ or the path that the information traveled.²²

As this government project evolved, computers from universities, businesses, and other government agencies all over the world merged into one main system.²³ By 1983, this "network of networks" had come to be established as the Internet.²⁴ Today, the Internet enables anyone connected to it to communicate with anyone else similarly connected without regard to limitations caused by differences in equipment or physical location.²⁵ To reach the information contained on the Internet, one must first obtain access through a service provider.²⁶ The computer is linked to the service provider by a modem.²⁷ Once the computer is connected to the service provider, a user can view content such as electronic mail, bulletin boards or sites on the World Wide Web ("web").²⁸ As one commentator noted, understanding how the web operates within the structure of the Internet is as simple as thinking of each website as a book.²⁹ The home page operates as the table of contents, while the other pages are similar to chapters, which can be accessed simply by clicking on their entry in the table of contents.³⁰ An individual who creates and operates the website is known as the site's "publisher" and the act of uploading speech or content onto the site is called "publishing."³¹

¹⁷ Maureen O'Rourke, *Fencing Cyberspace: Drawing Borders in a Virtual World*, 82 MINN. L. REV. 609, 616 (1998).

¹⁸ Doherty, *supra* note 4, at 260.

¹⁹ Alexander, *supra* note 6, at 979.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 979-980.

²³ O'Rourke, *supra* note 17, at 615-616 (stating in 1986, the National Science Foundation set up its own network ("NSFNET") which was complete with a high-speed communications backbone that linked machines together). By 1990, NSFNET connected to ARPANET and the Internet's backbone was created. *Id.*

²⁴ The term "network of networks" is often used to describe the Internet. See O'Rourke, *supra* note 17, at 616; BRYAN PFAFFENBERGER, *WORLD WIDE WEB BIBLE* 38 (2d ed. 1996); Michael J. Schmelzer, Note, *Protecting the Sweat of the Spider's Brow: Current Vulnerabilities of Internet Search Engines*, 3

B.U. J. SCI. & TECH. L. 12 (1997).

²⁵ Alexander, *supra* note 6, at 979-980.

²⁶ Marshall Brain, *How Web Servers Work: The Internet*, at <http://www.howstuffworks.com/web-server2.htm> (last visited Sept. 10, 2003) (stating a typical service provider is a commercial organization that sells Internet access to commercial and home users).

²⁷ Doherty, *supra* note 4, at 261.

²⁸ *Id.* (explaining that the World Wide Web operates as a series of sites that contain information and usually offers links to additional information or related sites). "Every document on the Web has a unique address called Uniform Resource Locator (URL) and the documents are stored on servers throughout the world." *Id.*

²⁹ O'Rourke, *supra* note 17, at 622.

³⁰ *Id.*

³¹ *Id.*

B. The Current State of the Internet

Today, the Internet is comprised of over 50,000 networks linked to at least nine million host computers in ninety countries around the world.³² The online community is also continuing to grow at a remarkable pace.³³ The number of Internet users has risen from 300 since the days of ARPANET in 1983, to 36,739,000 in 1998.³⁴ Moreover, the Internet's surge as a communication tool is not limited to any specific age group.³⁵ In the United States alone, 70.5 million of the approximately 202 million adults populating the country use the Internet.³⁶ In addition, one recent study predicts the number of Internet users ages 2 to 17 will exceed 44 million by the year 2005.³⁷ Though it is difficult to estimate the number of people who connect to the Internet each day, sources indicate that the Internet allows millions of users to communicate with each other and to access a mass of information all virtually within seconds.³⁸

ARPANET established the decentralized basis for the modern Internet.³⁹ In essence, what makes the Internet unique from other forms of modern communications is that there is "no centralized storage location, control point, or communications channel."⁴⁰ Because the Internet was designed as a series of independent networks linked together, the task of determining where all the information is located or where it is going is

virtually impossible.⁴¹

III. DEFINING OBSCENITY AND INDECENCY IN A VIRTUAL WORLD

A. The *Miller* Test

In 1973, the Supreme Court pronounced that obscenity was an appropriate subject for law enforcement and established a test for defining "obscenity" in the landmark decision *Miller v. California*.⁴² The well-known three-pronged test set out by the Court to prohibit obscenity is:

(a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.⁴³

By incorporating "community standards" in favor of "national standards," the Court observed that it would "neither be realistic nor constitutionally sound to read the First Amendment as requiring that people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City."⁴⁴ Chief Justice Burger, in rejecting the national standard, reasoned that what may appeal to the "prurient interest" or be "patently offensive" is essentially a question of fact; however, he also observed that our nation is

³² See *Shea v. Reno*, 930 F. Supp. 916, 925 (S.D.N.Y. 1996) (describing the origins of the Internet in a suit filed by a publisher of an electronic newspaper who raised a First Amendment challenge to the section of the Communications Decency Act that criminalizes the use of interactive computer services that send or display patently offensive materials).

³³ See Matthew Gray, *Internet Statistics: Growth and Use of the Web and the Internet*, at <http://www.mit.edu/people/mk-gray/net/internet-growth-summary.html> (1996) (last visited Sept. 10, 2003) (citing statistics that show the growth of Internet hosts from year to year increases by the millions).

³⁴ Doherty, *supra* note 4, at 262 (commenting that the increased use of the Internet was most evident in September of 1998 when Congress agreed to release Independent Counsel Kenneth Star's report on the alleged relationship between President Clinton and Monica Lewinsky). The number of users accessing CNN.com before the release peaked at 340,000 per minute, which set a record of most users per minute. *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ See Michael Pastore, *40 Percent of America's Kids Online*, CYBERATLAS, at <http://cyberatlas.internet.com> (last modified June 8, 2000) (citing research that shows children's access to the Internet from school is expected to surpass their home

access as soon as recent "classroom wiring initiatives" are widespread). The research also shows that this expected increase can be traced to families being more willing to purchase Internet access knowing that its primary use will be for their children's education. *Id.*

³⁸ O'Rourke, *supra* note 17, at 616-617.

³⁹ *Id.* ("The system was initially designed to be decentralized to guard against the disruption of communication flowing through it. It continued to be so as large numbers of independent computer and network operators connected to it.")

⁴⁰ Alexander, *supra* note 6, at 980.

⁴¹ *Id.*

⁴² See *Miller v. California*, 413 U.S. 15 (1973).

⁴³ *Id.* at 24 (commentating that the Court acknowledged the inherent dangers of regulating any form of expression and therefore legislation designed to regulate obscene materials must be carefully limited).

⁴⁴ *Id.* at 30 ("Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the 'prurient interest' or is 'patently offensive.'").

too big and diverse for the Supreme Court to expect that a uniform set of standards will apply to each state.⁴⁵ In discarding the national standard in *Miller*, the Chief Justice combined notions of both tradition and practicality.⁴⁶ He noted the importance of local juries to speak the minds of the communities that they represent.⁴⁷ Further, he suggested that the nation's variety of communities demanded a variety of community standards, rather than one voice speaking for one nation.⁴⁸

Until recently, Congress had applied this test only when regulating broadcasting and telecommunications.⁴⁹ Congress has attempted to apply the *Miller* test in regulating the Internet, but has yet to draft legislation that successfully passes constitutional scrutiny.⁵⁰ In particular, the question of which standard to use when applying the *Miller* test—national, local, or otherwise—has caused much controversy.⁵¹

B. *United States v. Thomas*: The *Miller* Test Applied to the Internet

The *Miller* holding in 1973 was premised upon a notion of obscenity existing in a real and physical world that was conceived decades before the Internet was created.⁵² Thus, the question re-

mains whether its holding is applicable to obscenity as it exists in a virtual world. In 1996, the Sixth Circuit reviewed whether the *Miller* test should be used in determining when online obscenity can be prohibited, or in the alternative, whether a "virtual community standard" could be used to judge sexually explicit content on the Internet.⁵³ In *United States v. Thomas*, a couple was convicted of distributing obscene images and videos via their own bulletin board system from their household.⁵⁴ They scanned sexually explicit photographs taken from magazines into computer files, and clients paid a membership fee to access them on the bulletin board.⁵⁵ After the U.S. Postal Inspector received complaints, the Thomas' were arrested and convicted of violating federal obscenity law.⁵⁶ On appeal to the Sixth Circuit, the Thomas' argued that the nature of the sexually explicit material at issue should be determined by a virtual community standard, not the standard of the Western District of Tennessee.⁵⁷ The court rejected the Thomas' arguments and held that the defendants' knowledge of the subscribers' location was sufficient to establish a nexus to the federal district in Tennessee.⁵⁸

The Sixth Circuit's holding in *Thomas* was fact-specific and therefore limited.⁵⁹ Thus, questions

⁴⁵ *Id.* (holding that a state requirement to structure obscenity proceedings around a national community standard would be futile) (emphasis added).

⁴⁶ Alexander, *supra* note 6, at 1005 (explaining that the Court's basis for its decision was founded on the concept that local juries should represent only their community). The traditional basis for the decision is grounded in the notion that different geographic areas have always had different ideas as to what conduct is tolerable in public. *Id.*

⁴⁷ *Id.*

⁴⁸ *Miller*, 413 U.S. at 32 ("[D]iversity is not to be strangled by the absolutism of imposed uniformity.").

⁴⁹ Julie Van Camp, *Indecency on the Internet: Lessons from the Art World*, ENTERTAINMENT, PUBLISHING, AND THE ARTS HANDBOOK, 256 (Stephen F. Breimer et. al. eds., 1996).

⁵⁰ *Id.* ("[The *Miller* language] has been used by Congress in the regulation of broadcasting and telecommunications . . . [b]ut the Congressional attempt to pass Constitutional muster by incorporating this language into such legislation has not always succeeded in the courts.").

⁵¹ See generally Patrick T. Egan, *Virtual Community Standards: Should Obscenity Law Recognize the Contemporary Community of Cyberspace?*, 30 SUFFOLK U. L. REV. 117 (1996) (stating networked computers have begun a communication revolution comparable to Gutenberg's invention of the printing press). "Time spent in Cyberspace has altered the concept of community for computer users. For over twenty years, courts have applied a geographically local community standard when employing this test. Pornography transmitted over the Internet, however, raises [new] questions regarding which

community's standard applies in cyberporn prosecutions." *Id.*

⁵² Alexander, *supra* note 6, at 1006.

⁵³ *United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996).

⁵⁴ *Id.* at 705.

⁵⁵ *Id.*

⁵⁶ *Id.* ("As a non-member, [Agent David Dirmeyer, the Postal Inspector] viewed a screen that read 'Welcome to AABBS, the Nastiest Place On Earth,' and was able to select various 'menus' and read graphic descriptions of the GIF files and videotapes that were offered for sale . . ."). The Agent used his computer in Memphis to download GIF files that depicted indecent sex scenes. *Id.*

⁵⁷ The Thomases argued for a new definition of community, "one that is based on the broad-ranging connections among people in cyberspace rather than the geographic locale of the federal judicial district of their criminal trial." *Id.* at 711-712. The basis for their argument was that without this new community definition, there would be a chill on protected speech because web operators cannot select who gets the materials they make available online and therefore they will be forced to censor their materials. *Id.*

⁵⁸ See *id.* at 709; see also *United States v. Bagnell*, 679 F.2d 826, 830 (11th Cir. 1982) (holding that "there is no constitutional impediment to the government's power to prosecute pornography dealers in any district into which the material is sent.").

⁵⁹ *Thomas*, 74 F.3d at 712 ("[U]nder the facts of this case, there is no need for this court to adopt a new definition of 'community' for use in obscenity prosecutions involving elec-

about whether a "virtual community standard" could ever be adopted still remain unanswered. Consequently, any federal law that regulates obscenity on the Internet must address which community should judge whether the sexually explicit material on the Internet is obscene.⁶⁰

C. Which "Community" Should Govern Online Obscenity?

The position that obscenity should be judged community-by-community is well supported, especially now after the development of the Internet.⁶¹ In this sense, imposing uniformity to online obscenity regulation could have a negative effect on the diversity of the material that is available online.⁶² However, even if uniform national standards are to be dismissed, the question of whether the local community or an alternative "virtual community" should govern online regulation remains contentious.⁶³ There are essentially two positions that represent the "local community standard." An analysis of their efficacy will demonstrate why the "virtual standard" represents a more practical solution.

The first position, known as "recipient jurisdiction," is that the appropriate jurisdiction and community standard would depend on where the sexually explicit material was received or downloaded.⁶⁴ Besides creating uncertainty as to

applicable standards, this position makes the distributor subject to jurisdiction in any location within the United States.⁶⁵ A U.S. Attorney seeking to prosecute a distributor in a particular locale would have the ability to do so simply by accessing the distributor's website in his own community.⁶⁶ It seems apparent that recipient jurisdiction would not be feasible because this *virtual presence* would not act as an appropriate substitute for *actual presence* by the distributor.⁶⁷ Moreover, the chilling effect on speech would be far reaching.⁶⁸

In the alternative, "provider's jurisdiction" has been argued to be an effective standard by which online obscenity should be measured.⁶⁹ The basis for this position is that the government should prosecute the individual in the physical location where he has made available the obscene material on the Internet.⁷⁰ Admittedly, this approach offers some tangible benefits. First, it allows communities to control the acceptable content that is to be distributed within their physical locality.⁷¹ Furthermore, this type of jurisdiction has a practical approach—while the communications that we would be concerned with appear on the Internet in a borderless world, the content is still created or at least uploaded by a real individual in a real place.⁷² Despite these benefits, however, this option is still considerably flawed.⁷³ Instead of too much government control, this approach pro-

tronic bulletin boards.").

⁶⁰ Alexander, *supra* note 6, at 1008.

⁶¹ When applying community standards to an obscenity case, the *Miller* Test is still governing law. See *Thomas*, 74 F.3d at 710-711 (acknowledging that the first prong of the *Miller* obscenity test is a general principle and well-settled law).

⁶² Alexander, *supra* note 6, at 1012 n.188 ("[A] national standard would place—almost return—the United States Supreme Court to a position of being the ultimate arbiter of what sexually explicit material on the Internet is obscene. The Court's days of struggling to define obscenity on a case-by-case basis are over, thankfully.").

⁶³ See generally, *Thomas*, 74 F.3d at 701.

⁶⁴ Alexander, *supra* note 6, at 1009 (noting that "[u]nder this approach, the only sexually explicit material that may be distributed across the internet would be that which is tolerated in the least permissive jurisdiction in the country," and therefore runs afoul to the First Amendment obscenity law because it chills speech).

⁶⁵ *Id.*

⁶⁶ *Id.* ("The recipient's jurisdiction would leave open the door for prosecutions almost anywhere, without the sender having knowledge of the fact that the material had ever been downloaded there. Such prosecutions would improperly chill First Amendment rights . . .").

⁶⁷ See *Pres-Kap, Inc. v. System One, Direct Access, Inc.*, 636 So.2d 1351, 1353 (Fla. Dist. Ct. App. 1994) (holding that an assertion of personal jurisdiction on the action of an individual downloading materials into a forum instead of based on a distributor's direct contact with a forum is "wildly beyond the reasonable expectations of computer users").

⁶⁸ See William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 WAKE FOREST L. REV. 197, 210 (1995) ("If each cyberspace user must govern her speech in accordance with the most restrictive of these communities, then either much will remain unexpressed, or . . . the virtual community will restrict access of the members of those restrictive jurisdictions to entire conversational subjects or to membership in the community itself.").

⁶⁹ Alexander, *supra* note 6, at 1013 (arguing that "provider's jurisdiction" is a better option than "recipient's jurisdiction" because the local community would have the ability to regulate itself and remain within the dictates of *Miller*).

⁷⁰ See Timothy S. T. Bass, *Obscenity in Cyberspace: Some Reasons for Retaining the Local Community Standard*, 1996 U. CHI. LEGAL F. 471, 493-494 (1996).

⁷¹ *Id.* at 483-484.

⁷² Alexander, *supra* note 6, at 1013.

⁷³ *Id.*

vides essentially no government control at all.⁷⁴ Distributors of obscene material could simply move to the least restrictive jurisdictions, post their content on the Internet, and manage to circumvent any regulations that may have been set in other jurisdictions.⁷⁵

In seeking to adopt a uniform standard to judge obscene material found online, the defendants in the *Thomas* case developed the concept of a "virtual community."⁷⁶ At trial, the *Thomas*' argued that there should be a separate community standard for cyberspace because it is a non-physical space that still acts as a "community" to its users.⁷⁷ Fundamental to the principle of community standards is the notion that a community relies on the proximity of its members.⁷⁸ In an Internet community, which is not bound by any geographical borders, it is axiomatic that these members should not be judged by the standards of those communities with geographical boundaries.⁷⁹ Several commentators, noting the flaws in local and national community standards, have demonstrated that a solution to the discrepancy in the law would be for the law not to view a computer user as part of his or her geographic community while they are online, but rather to be judged in terms of the community in which he is actually engaged.⁸⁰

Admittedly, the concept of a virtual community does have its drawbacks. As already stated, the recipients of communications that are transmitted via the Internet represent an extremely diverse population, and therefore the creation of a uniform "cyber citizen" to act as a model for deter-

mining which online communications are obscene would be very difficult.⁸¹ Without meaningful definition of the standards within this "virtual community," the *Miller* test would be inoperable and the rights protected by the First Amendment would be violated.⁸² Accordingly, Congress would need to answer several precise questions in order to define this community accurately. For example, who resides in a virtual community?⁸³ Is it any person who has ever accessed information on the Internet or instead, is it a more frequent user?⁸⁴ Is it any person who accesses any kind of information, or is it limited to strictly information that is sexually explicit?⁸⁵

D. *FCC v. Pacifica Foundation*: Current Law on Broadcast Indecency

Short of obscenity, indecent speech is constitutionally protected, but it may be regulated if the content contravenes a compelling state interest.⁸⁶ A Supreme Court decision regarding free speech over electronic communication was *Federal Communications Commission v. Pacifica Foundation*, where the Court held that FCC regulations prohibiting "indecent" or "obscene" speech on the radio do not violate the First Amendment.⁸⁷ After a radio broadcast of comedian George Carlin's monologue, "Filthy Words," the FCC determined that certain words depicting excretory and sexual activities violated the FCC's definition of broadcast indecency.⁸⁸ The FCC defines broadcast indecency as "language or material that, in context, depicts or describes, in terms patently of-

⁷⁴ *Id.* at 1014 (commenting that this is essentially the reverse of the "recipient jurisdiction" problem, instead of too much control there is no control whatsoever).

⁷⁵ *Id.* (implying that the communities would lose control over this media and that this is precisely the problem that *Miller* intended to prevent with its three-prong test).

⁷⁶ *Thomas*, 74 F.3d at 711-712.

⁷⁷ Byassee, *supra* note 68, at 198-199.

⁷⁸ Alexander, *supra* note 6, at 1030 ("Computer technologies allow individuals to create unique communities of people who share similar interests and wish to communicate with each other about those interests.").

⁷⁹ Byassee, *supra* note 68, at 199 (arguing Internet users are even more connected to each other than physical neighbors and therefore the citizens of the Internet community should be given the opportunity to determine what is obscene for themselves).

⁸⁰ See generally Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces*, 104 YALE L. J. 1639, 1653-54, 1672 (1995) (asserting that the virtual community's standards should govern an

obscenity analysis, at least where no harmful consequences can be demonstrated in a geographical community); but cf. Donald T. Stepka, *Obscenity On-Line: A Transactional Approach to Computer Transfers of Potentially Obscene Material*, 82 CORNELL L. REV. 905, 907 (1997) (arguing the law need not recognize a "virtual community" for purposes of the community standards analysis set forth in *Miller*, but instead courts need to re-examine their understanding of online transactions to avoid inequitable decisions under the existing law).

⁸¹ Branscomb, *supra* note 80, at 1668.

⁸² Alexander, *supra* note 6, at 1010-1011.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Doherty, *supra* note 4, at 269 (maintaining that indecent material often includes offensive sexual expression which does not meet the *Miller* definition of "obscene" when distributed among adults).

⁸⁷ *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978).

⁸⁸ *Id.* at 729-730.

fensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs."⁸⁹ The *Pacifica* Court adopted the FCC's definition of "indecent" and held that the Commission's regulation of indecency was not overbroad.⁹⁰ In his majority opinion, Justice Stevens wrote that the FCC properly classified the broadcast as indecent because the content heard on the radio was offensive and shocking.⁹¹

It is a violation of federal law to broadcast obscene or indecent programming.⁹² This prohibition is set forth in Title 18 of the United States Code at §1464.⁹³ Congress has conferred the authority to the Federal Communications Commission to enforce this section of the Code.⁹⁴ However, at this time, §1464 does not include the authority to regulate obscenity or indecency on the Internet.⁹⁵ As a medium, is the Internet similar enough to broadcasting communications that the *Pacifica* holding should apply to online communications as well?⁹⁶

In its holding, the *Pacifica* Court noted that there should be special treatment for such indecency prohibition when dealing with broadcasting for four reasons: (1) children have access to radios and are often unsupervised by parents; (2) radio receivers are in the home, a place where citizens' privacy interests are entitled to extra deference; (3) unconsenting adults may tune into a station without any warning that offensive language

will be broadcast; and (4) due to a scarcity of spectrum space, the government must license spectrum space in the public interest.⁹⁷

The first two reasons given by the Court show remarkable similarities in how computers and the Internet are utilized in today's society. In the same way that radios or televisions are found in the home, many children also have unsupervised access to computers and the Internet in the home as well.⁹⁸

Notwithstanding these similarities, the district court in *ACLU v. Reno* discussed how the remaining factors of "invasiveness" and "scarcity" mark significant differences between the two media.⁹⁹ Chief Judge Sloviter questioned whether one can accidentally call up a website or e-mail program in the same manner one might accidentally hear something on the radio. The Chief Judge noted that "[e]ven if a broad search will, on occasion, retrieve unwarranted materials, the user virtually always receives some warning of its content, significantly reducing the element of surprise or 'assault' involved in broadcasting."¹⁰⁰ Chief Judge Sloviter found the "element of surprise" factor significantly more compelling in an indecency analysis than the previous two factors that dealt with the unsupervised nature of the media within one's home.¹⁰¹ Commentators have disagreed with the Chief Judge's position concerning whether or not inadvertent exposure to the In-

⁸⁹ 8 F.C.C. Rcd. 704, 705 n.10 (1993).

⁹⁰ *Pacifica*, 438 U.S. at 726.

⁹¹ *Id.* at 731 n.2.

⁹² See generally, *Pacifica*, 438 U.S. at 726 (holding that the FCC order did not violate broadcaster's First Amendment rights even if broadcast was not obscene because the FCC was correct in prohibiting the indecent monologue because of the special factors presented by or inherent in the broadcast media).

⁹³ See 18 U.S.C. §1464 ("Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.").

⁹⁴ See 47 U.S.C. §303(m)(1)(D) ("Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall . . . [h]ave authority to suspend the license of any operator upon proof sufficient to satisfy the Commission that the licensee . . . has transmitted superfluous radio communications or signals or communications containing profane or obscene words, language, or meaning . . .").

⁹⁵ Section 303 grants the FCC specific regulatory authority over broadcast communications. See 47 U.S.C. §303(r) ("Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or

necessity requires, shall . . . make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act . . ."). At this time, these FCC powers and duties have not been interpreted to apply to the Internet and the FCC has not read its general rulemaking provision to be consistent with the Congressional grant of authority under this section. See *id.*

⁹⁶ Eric S. Slater, *Broadcasting on the Internet: Legal Issues for Traditional and Internet-Only Broadcasters*, 6 MEd. L. & Pol'y 25, 30 (1997) (asking whether traditional law should be applied to the Internet). "Is the Internet similar to traditional media (such as broadcasting), or is the Internet different enough to warrant a different set of rules and laws to govern it?" *Id.*

⁹⁷ *Pacifica*, 438 U.S. at 731 n.2.

⁹⁸ Van Camp, *supra* note 49, at 256-257 ("[The first two] factors have obvious relevance to the Internet. Many children have access to computers in the home and are often unsupervised by parents.").

⁹⁹ *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996).

¹⁰⁰ *Id.* at 852.

¹⁰¹ *Id.* at 844-845 (stating it is highly unlikely that a very young child will be randomly 'surfing' the web and come across 'indecent' or 'patently offensive' material).

ternet is possible.¹⁰² In finding that the Internet is inherently different than broadcasting in terms of its "assault-factor," one commentator compared the Internet to a bookstore—"sex on the Internet is not segregated and signposted like in a bookstore, and it is not [as] easy to avoid."¹⁰³ Despite these arguments, the Supreme Court found Judge Sloviter's argument persuasive. Additionally, courts have also recognized that, unlike the radio airwaves, the Internet is not a scarce resource. In *Turner Broadcasting Systems v. FCC*, the Supreme Court held that because forty million users across the world have the capacity to access the Internet at low cost, the medium could not be considered "scarce." These combined factors led the Supreme Court in *Reno* to dismiss the online application of *Pacifica* and to afford the Internet First Amendment protection similar to that given to the print media.

IV. FIRST AMENDMENT IMPLICATIONS TO ONLINE REGULATION

A. Principles of the First Amendment

In light of *Miller* and *Pacifica*, determining how obscenity and indecency laws could successfully be applied to the Internet requires a strong understanding of the First Amendment. The First

Amendment provides, "Congress shall make no law . . . abridging the freedom of speech."¹⁰⁴ As *Miller v. California* illustrates, the Supreme Court has concluded that the First Amendment does not protect all kinds of speech.¹⁰⁵ There are two broad classifications of speech: content-neutral and content-based speech.¹⁰⁶ If government regulation of speech is content-based, that is, relating to the communicative impact of the speech, that regulation will be subjected to strict scrutiny.¹⁰⁷ On the other hand, if the government action is "content-neutral," that action would most likely be subject to a significantly less rigid review.¹⁰⁸

The Supreme Court has held that, in order for a regulation to survive strict scrutiny, the government must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.¹⁰⁹ In essence, the government regulation must be the least restrictive means by which to further the state's interest. Thus, the strict scrutiny standard has been applied to any government regulation that restricts the content of an individual's speech.¹¹⁰

The doctrines of overbreadth and vagueness are also important in determining whether a government regulation of speech violates the First Amendment. A statute is overbroad if it bans speech that could constitutionally be forbidden but, in doing so, also bans speech that is protected by the First Amendment.¹¹¹ A statute would

¹⁰² See Alexander, *supra* note 6, at 982 ("[C]hildren online may have free and unhindered access to almost all of the available adult content on the Internet. This is true regardless of whether the child is curious and Internet savvy or merely surfing the Web . . . to learn more about his or her favorite hobbies or sports.").

¹⁰³ See *id.* at 982 ("Some heavy-duty imagery is incredibly easy to stumble upon . . . [Y]outh do not have to be all that active in exploring the Internet to run across sexual material inadvertently."); see also David Finkler, Kimberly Mitchell & Janice Wolak, *Online Victimization: A Report on the Nation's Youth*, Crimes Against Children Research Center (2001) (on file with author) (detailing a broad study about child victimization online where children are inadvertently exposed to online indecency). The study provides an example of an eleven-year-old boy who, while looking for game websites, typed in "fun.com," and was exposed to a pornographic website. *Id.*

¹⁰⁴ U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

¹⁰⁵ *Miller*, 413 U.S. at 23 (holding that obscene speech receives no First Amendment protection).

¹⁰⁶ Compare *Va. State Bd. of Pharmacy v. Va. Consumer*

Council, 425 U.S. 748 (1976) (dealing with content-based classification of speech) with *Schneider v. State*, 308 U.S. 147 (1939) (dealing with content-neutral classification of speech).

¹⁰⁷ See WILLIAM KAPLIN, *THE CONCEPTS AND METHODS OF CONSTITUTIONAL LAW*, 55 (1992) (noting that when courts apply strict scrutiny, they look closely at the government action compared to its justifications and are likely to deem the action unconstitutional). Of all of the judicial standards of review that courts use to guide the disposition of particular cases, strict scrutiny is the most extreme and shows the least deference towards the constitutionality of a particular policy. *Id.* at 55-56.

¹⁰⁸ *Id.* at 172 (suggesting that because "content-neutral" restrictions do not involve viewpoint discrimination they do not merit the strictest scrutiny).

¹⁰⁹ See generally *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Ark. Writer's Project, Inc. v. Ragland*, 481 U.S. 221 (1987).

¹¹⁰ See generally *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (re-stating that the government must show a compelling state interest to justify a regulation of content-based speech).

¹¹¹ See Kaplin, *supra* note 107, at 171 (explaining the overbreadth doctrine allows a party to challenge a regulation *on its face* despite the fact that the regulation would otherwise be constitutional *as applied* to the conduct engaged in by that

be unconstitutionally vague if the conduct forbidden by it is so unclearly defined that a reasonable person would have to guess at its meaning.¹¹²

B. Medium-Specific First Amendment Analysis

The Supreme Court treats various forms of communication differently when applying First Amendment standards.¹¹³ Traditionally, print media has been free from government regulation.¹¹⁴ In *Pacifica*, the Court used a less strict level of scrutiny towards Carlin's radio broadcast because of the distinct characteristics of the broadcast medium.¹¹⁵ The Supreme Court applied similar First Amendment protection to cable television as well because, like broadcasts, cable is accessible to children and has a potentially pervasive presence in a viewer's home.¹¹⁶

The Court addressed the telecommunications medium in *Sable Communications v. FCC*.¹¹⁷ In *Sable*, the Supreme Court held that regulations prohibiting "indecent" communication on interstate commercial telephone lines violated the First Amendment.¹¹⁸ The Supreme Court held that a portion of the statute, codified at §223(b) of the Telecommunications Act,¹¹⁹ was constitutional because it banned obscene speech that is not protected by the First Amendment.¹²⁰ None-

theless, the Court found that the "dial-a-porn" medium was less pervasive than the broadcast medium in *Pacifica* because callers must take affirmative steps to receive dial-a-porn messages.¹²¹ In upholding the FCC's regulation of indecent speech, the Court used a strict scrutiny standard in analyzing telephone communication.¹²²

C. What Kind of First Amendment Protection Should the Internet Receive?

Even if the Internet is unique from other traditional forms of media, it is nonetheless most closely akin to telephone communication.¹²³ In rejecting the notion that the Internet should receive the same regulatory status as the broadcast media, Chief Judge Sloviter in *Reno* posited that the Internet was inherently related to the telephone.¹²⁴ Initially, there are obvious physical similarities in the manner by which each form of communication is accessed. The Internet, like the telephone, can be accessed through telephone lines via a modem that is linked to a computer.¹²⁵ More significantly, with both forms of communication, the user must affirmatively search for the information.¹²⁶ Just as a caller would need to dial a number to complete his call, a computer user must either type in a web address or perform an

party) (emphasis added).

¹¹² *Id.* (stating courts require a greater degree of clarity under the speech clause because a vague regulation may "chill" the free speech rights more than other general regulations).

¹¹³ See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969) ("Although broadcasting is clearly a medium affected by a First Amendment interest, differences in the characteristics of new media justify differences in the First Amendment standards applied to them.") (internal citations omitted).

¹¹⁴ Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062, 1071 (1994) ("[T]he print medium . . . enjoys virtually absolute protection from government restriction. Even when a newspaper possesses an economic monopoly and therefore has the power to exclude particular speech from its pages, the Court has recognized the primacy of publishers' First Amendment rights over others' claims of access.") (internal citations omitted).

¹¹⁵ *Pacifica*, 438 U.S. at 748.

¹¹⁶ See *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 744 (1996) (holding cable television is as pervasive and accessible to children as broadcast media).

¹¹⁷ 492 U.S. 115 (1989).

¹¹⁸ See *id.* at 131 (holding that the statute's denial of adult access to telephone messages are not obscene, and therefore the ban does not survive strict scrutiny); see also *Van Camp*, *supra* note 49, at 256-258.

¹¹⁹ 47 U.S.C. § 223(b) (2000).

¹²⁰ *Sable*, 492 U.S. at 126 (holding "sexual expression" that is indecent, but not obscene, is protected by the First Amendment).

¹²¹ *Id.* at 117-119, 124 (defining a dial-a-porn service as an adult's use of the telephone to access and listen to indecent recordings for a price).

¹²² *Doherty*, *supra* note 4, at 271-272 ("While the court acknowledged that protecting the well-being of minors is a compelling government interest, it found that alternatives existed that were less restrictive than a complete ban on indecent speech, which would deny adult access.").

¹²³ See Jennifer J. Lee, *The Internet and the First Amendment Values: Reno v. ACLU and the Democratization of Speech in the Marketplace of Ideas*, 22 COLUM.-VLA J.L. & ARTS 61, 66-67 (1997) (analyzing that the user actively searches for information when accessing the Internet through the telephone).

¹²⁴ See *Reno*, 929 F. Supp. at 852-853 ("[T]he evidence . . . show[s] that Internet communication, while unique, is more akin to telephone communication, at issue in *Sable*, than to broadcasting, at issue in *Pacifica*, because, as with the telephone, an Internet user must act affirmatively and deliberately to retrieve specific information online."). "[Two-way communication over the Internet is] analogous to a telephone party line, using a computer and keyboard rather than a telephone." *Id.* at 835.

¹²⁵ See *id.* at 832; see also Lee, *supra* note 123 at 67.

¹²⁶ Slater, *supra* note 96.

Internet search using his own key words. In light of these similarities to the telephone, as well as the differences to broadcast media, it is apparent that *Sable* should guide the courts in determining the level of First Amendment protection afforded to the Internet. Consistent with *Miller*, the *Sable* court reaffirmed the constitutionality of prohibiting "obscenity," while holding that the prohibition of "indecent" would violate the First Amendment.¹²⁷ *Sable* recognized that banning indecent speech was simply not the "least restrictive means" to further the government's interest in protecting children.¹²⁸ With this comparison between the Internet and the telephone in mind, one can now review how existing statutory obscenity law has successfully been applied to the Internet.¹²⁹

D. Successfully Applying Obscenity Law to the Internet

Several existing federal statutes governing obscenity have already been successfully applied to the Internet.¹³⁰ Two statutes, in particular, that have been found to be relevant to the Internet¹³¹ are: 18 U.S.C. §1460, which makes it a crime to possess obscene material with the intent to distribute,¹³² while 18 U.S.C. §1462 makes it a crime to distribute or receive obscene materials through a common carrier in interstate or foreign commerce.¹³³ Additionally, 18 U.S.C. §1464 prohibits

broadcasting "obscene, indecent, or profane language."¹³⁴ Finally, 18 U.S.C. §§1465 and 1466 prohibit one from knowingly "transporting or engaging in the business of selling obscene, lewd, or filthy material through interstate commerce."¹³⁵

V. CONGRESSIONAL ATTEMPTS TO REGULATE OBSCENITY ON THE INTERNET

A. Communications Decency Act

In the midst of rapid technological advancement, Congress assumed the responsibility of ensuring that the fastest growing communications medium in history did not violate the traditional legal notions of obscenity under the *Miller* test.¹³⁶ Perhaps in response to the perception that a child's access to sexually explicit material was infinite, Congress' first attempt at regulation focused on what it considered to be its most compelling interests—"the protection of children from pornography and the prosecution of those who promote the sexual exploitation of children."¹³⁷ The Communications Decency Act ("CDA") was originally a Congressional addition to the Telecommunications Act of 1996.¹³⁸ The CDA, which was included in Title V of the Act, was proposed by Senator James Exon (D-Neb) in an effort to make the Internet "superhighway a safe place for our chil-

¹²⁷ *Sable Communications*, 492 U.S. at 131 ("Because the statute's denial of adult access to telephone messages which are indecent but not obscene far exceeds that which is necessary to limit the access of minors to such messages, we hold that the ban does not survive constitutional scrutiny.").

¹²⁸ *Id.*

¹²⁹ See 18 U.S.C. §§ 1460-1469 (1994 & Supp. 1997).

¹³⁰ See Doherty, *supra* note 4, at 278-279; see also Robert F. Goldman, *Put Another Log on the Fire, There's a Chill on the Internet: The Effect of Applying Current Anti-Obscenity Laws to Online Communications*, 29 GA. L. REV. 1075, 1108-11 (describing that the sections of the statute are "medium-specific" and some are found to be relevant in their application to the Internet).

¹³¹ Doherty, *supra* note 4, at 278-279.

¹³² 18 U.S.C. §1460 (1994) ("Whoever . . . in the . . . territorial jurisdiction of the United States . . . knowingly sells or possesses with intent to sell an obscene visual depiction shall be punished by a fine in accordance with the provisions of this title or imprisoned for not more than two years, or both.").

¹³³ *Id.* at §1462.

¹³⁴ See *id.* at §1464 ("Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both."); see generally Charles D. Ferris & Ter-

rance J. Leahy, *Red Lions, Tigers, and Bears: Broadcast Content Regulation and the First Amendment*, 38 CATH. U. L. REV. 299 (1989) (arguing that broadcast content requires a limited amount of government oversight).

¹³⁵ 18 U.S.C. §1465 (1994 & Supp. 1997) ("Whoever knowingly transports or travels in . . . interstate or foreign commerce or an interactive computer service . . . in or affecting such commerce for the purposes of sale or distribution of any . . . matter of indecent or immoral character, shall be fined under this title or imprisoned . . . or both."); *Id.* §1466 ("Whoever is engaged in the business of selling or transferring obscene matter, who knowingly receives or possesses with intent to distribute any [material], which has been . . . transported in interstate or foreign commerce, shall be punished by imprisonment . . . or by a fine under this title, or both.").

¹³⁶ Alexander, *supra* note 6, at 977-978.

¹³⁷ John Krieger, *Will the Third Time Be a Charm or a Strike? Regulating Sexually Explicit Content on the Internet*, NEV. LAWYER, 12 (Aug. 2002).

¹³⁸ See *Reno*, 521 U.S. at 857-859 ("The major components of the statute have nothing to do with the Internet; they were designed to promote competition in the local telephone service market, the multichannel video market, and the market for over-the-air broadcasting.").

dren and our families to travel on.”¹³⁹ The statute criminalized “the knowing transmission of obscene or indecent images” and “the knowing sending or displaying of patently offensive messages” to anyone, or in front of anyone, under the age of 18.¹⁴⁰ The potential consequences for such acts were fines up to \$250,000 and up to two years imprisonment.¹⁴¹

Very early on, it was clear that the bill’s provisions would not survive the Supreme Court’s First Amendment scrutiny.¹⁴² Several members of Congress suspected that the bill was unconstitutional.¹⁴³ President Clinton was also aware of the bill’s flaws, but he nonetheless chose to sign it into law in 1996.¹⁴⁴ With the proposed state interest of protecting children from access to pornography and criminalizing those who exploit children in this manner, no politician was able to vote against this legislation, despite its suspected unconstitutionality, because of the fear of being labeled as a public figure that “supported Internet pornography.”¹⁴⁵

The constitutionality of the CDA was immediately challenged by several advocacy groups on the basis of the First Amendment right to free speech.¹⁴⁶ These groups moved for a temporary restraining order in federal district court in Pennsylvania seeking to enjoin enforcement of the indecency portion of the CDA.¹⁴⁷ Proponents of the bill argued that the law protected children from objectionable content that is readily available online.¹⁴⁸ The court rejected this argument and the federal government lost as a three-judge panel granted the order, finding that the provisions in the bill were unconstitutional because they were both vague and overbroad in their use of the terms “indecent” and “patently offensive.”¹⁴⁹

The Supreme Court reviewed the constitution-

ality of the CDA on the government’s appeal and upheld the district court’s decision by a 7-2 majority.¹⁵⁰ The Court held that the provisions at issue were impermissible content-based restrictions on speech.¹⁵¹ As a result, the CDA indecency provisions of 47 U.S.C. §223(a) and (d) were invalidated. In its holding, the Court identified why the Internet was subject to strict scrutiny, while the broadcast media was subject to a less stringent standard of review.¹⁵² The three reasons advanced by the Court were: (1) the Internet has no history of government regulation; (2) the Internet has no scarcity of available frequencies; and (3) the Internet does not “invade” an individual’s home.¹⁵³ The Court concluded, “[t]he growth of the Internet has been and continues to be phenomenal [and the] interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.”¹⁵⁴

B. Child Online Protection Act

When the Supreme Court declared the CDA unconstitutional, Congress revisited the issue and drafted the Child Online Protection Act (“COPA”) in 2000. COPA made it a federal crime for commercial web publishers who “knowingly and with knowledge of the character of the material . . . [use] the World Wide Web [to make] available to any minor . . . any material that is harmful to minors.”¹⁵⁵ In response to the quick judicial dismantling of the CDA, Congress sought to make substantive changes to COPA that would ultimately withstand constitutional scrutiny. Congress drafted the language of COPA as narrowly as possible to avoid the pitfalls of overbreadth and vagueness.¹⁵⁶ The resulting legislation differed

¹³⁹ Doherty, *supra* note 4, at 273.

¹⁴⁰ 47 U.S.C. §223(a), (d).

¹⁴¹ *Id.*

¹⁴² Alexander, *supra* note 6, at 984.

¹⁴³ See Stephen Chapman, *Clinton is No Friend of Free Speech*, CHI. TRIB., July 3, 1997, at 23 (stating that Newt Gingrich denounced the bill for infringing on free speech); see also Alexander, *supra* note 6, at 993, n.100 (stating that Sen. Patrick Leahy received a letter from then-acting Assistant Attorney General Kent Markus that the proposal was an attempt to “impose criminal sanctions on the transmission of constitutionally protected speech.”).

¹⁴⁴ Alexander, *supra* note 6, at 984-985.

¹⁴⁵ *Id.* at 978.

¹⁴⁶ Plaintiffs included the American Civil Liberties Union, Computer Professionals for Social Responsibility,

Inc., Electronic Frontier Foundation, Electronic Privacy Information Center, Human Rights Watch, Institute for Global Communications, Journalism Education Association, National Writers Union, and Planned Parenthood Federation of America, Inc. See Doherty, *supra* note 4, at 273-274.

¹⁴⁷ *ACLU*, 929 F.Supp. 824.

¹⁴⁸ Alexander, *supra* note 6, at 985.

¹⁴⁹ *ACLU*, 929 F.Supp. at 824.

¹⁵⁰ *Reno*, 521 U.S. at 844.

¹⁵¹ *Id.* at 868.

¹⁵² Doherty, *supra* note 4, at 275.

¹⁵³ *Reno*, 521 U.S. at 868.

¹⁵⁴ *Id.* at 885.

¹⁵⁵ 47 U.S.C. §231(a)(1) (2000).

¹⁵⁶ Alexander, *supra* note 6, at 989.

from the CDA in three fundamental ways: (1) COPA applied to material only displayed on the World Wide Web, whereas the CDA applied to all communications on the Internet (i.e. electronic mail); (2) COPA only covered commercial communications; and (3) COPA limited and defined the breadth of the speech that would be "harmful to minors."¹⁵⁷

The American Civil Liberties Union ("ACLU") filed suit in the Eastern District of Pennsylvania challenging the constitutionality of COPA.¹⁵⁸ The district court enjoined enforcement of COPA, holding it unconstitutional because of its restrictions on protected adult speech.¹⁵⁹ The court held that COPA was neither narrowly tailored nor the least restrictive means to achieve the government's interests for four reasons: (1) COPA did not apply to any foreign websites that may contain offensive material; (2) credit card authorizations were ineffective because many minors possessed credit cards legitimately; (3) the legislation applied to all web content and was therefore over-inclusive; and (4) filtering software used by parents was less burdensome than COPA and seen as just as effective by the court.¹⁶⁰ On appeal, the appellate court affirmed the district court's holding, but did so on different grounds.¹⁶¹ The Third Circuit held that COPA was unconstitutional based on its overbroad "contemporary community standards" and its definition of "harmful to minors."¹⁶² The appellate court reasoned that the application of the contemporary community standards test to the Internet resulted in an unconstitutional burden on protected speech because it applied a geographical standard to a non-spatial

medium.¹⁶³

The Supreme Court's holding, though limited, did not allow COPA to be enforced.¹⁶⁴ Before remanding the case, the Court addressed the narrow question of whether the COPA's reliance on "community standards" to identify what material is harmful to minors would cause the legislation to be overbroad.¹⁶⁵ Six Justices observed that, although Congress had cured some of the defects of the CDA, there remained significant problems with vagueness and overbreadth.¹⁶⁶

C. Children's Internet Protection Act

The Children's Internet Protection Act ("CIPA") is Congress' latest attempt to regulate online material that is deemed to be harmful to minors.¹⁶⁷ CIPA requires that all public schools and libraries that have public computers with Internet access must install filtering software.¹⁶⁸ Filtering technology is designed to block any site that contains an objectionable word or material.¹⁶⁹ The installed filters would prevent individuals from accessing visual depictions that are "obscene" or "harmful to minors."¹⁷⁰ On its face, CIPA seemed to represent an improvement from CDA and COPA because it avoided using vague and overbroad standards.¹⁷¹ However, it quickly became clear to many that CIPA was no more than Congress attempting to provide a simple solution to a serious problem. Unfortunately, even as the technology becomes more advanced, filtering programs do not necessarily perform the function for which they were designed.¹⁷² The American Library Association ("ALA") has been fighting

¹⁵⁷ Kriegar, *supra* note 137, at 23.

¹⁵⁸ ACLU v. Reno, 31 F.Supp.2d. 473 (E.D. Pa. 1999).

¹⁵⁹ *Id.* at 495.

¹⁶⁰ ACLU v. Reno, 217 F.3d 162, 172 (3rd Cir. 2000).

¹⁶¹ Alexander, *supra* note 6, at 992.

¹⁶² ACLU, 217 F. 3d at 173-174.

¹⁶³ *Id.*

¹⁶⁴ Alexander, *supra* note 6, at 992-993 (reporting that the Supreme Court's ruling was limited because it did very little to clarify the law of regulating Internet pornography).

¹⁶⁵ See Ashcroft v. ACLU, 535 U.S. 564 (2002) ("COPA's reliance on community standards to identify material that is harmful to minors does not by itself render the statute substantially overbroad for First Amendment purposes.").

¹⁶⁶ *Id.*

¹⁶⁷ See Children's Internet Protection Act, Pub. L. No. 106-554 (2000).

¹⁶⁸ 47 U.S.C. §254(h) (2001).

¹⁶⁹ Alexander, *supra* note 6, at 1016 ("Filtering technology was developed in the mid-1990s to block access to por-

nography Today the most common form of filtering is based on a website's address.").

¹⁷⁰ Kriegar, *supra* note 137, at 24 ("Moreover, the law permitted the determination of 'material deemed harmful to minors' to be made by the school, school board, library or other responsible authority making the required certification."). The facility was required to install these filtering software programs by July 1, 2000 or risk losing federal funding. *Id.*

¹⁷¹ Alexander, *supra* note 6, at 1016-1017 (commenting that any site that contained objectionable content would be blocked by the filtering program). Examples are keywords such as "breast," "sex," or "XXX." The filtering software would block both the objectionable sites, as well as sites containing the terms "chicken breast strips," "Middlesex County," and "Super Bowl XXX." *Id.*

¹⁷² *Id.* at 1016 (suggesting "Congress seemed to be taking a step in the right direction by changing its focus from federal regulation to empowering local communities . . .").

CIPA since its origin because the technology raises serious First Amendment concerns when it blocks both objectionable content on the Internet as well as constitutionally protected speech.¹⁷³ In 2002, the ALA's challenge to CIPA finally came before a federal district court in Pennsylvania.¹⁷⁴ The majority held that CIPA violated First Amendment protections and was unconstitutional because of vagueness and overbreadth.¹⁷⁵ The court concluded that filters did protect minors from obscene content on the Internet, but that the software would "incorrectly fail to block a substantial amount of speech."¹⁷⁶ Subsequently, even beyond the constitutional arguments, the effectiveness of filtering programs has often been questioned in their efforts to shield children from inappropriate content on the Internet.¹⁷⁷ In addition to blocking sites with acceptable content, a child could still potentially access obscene content on the Internet despite running his search on a computer that uses a filtering program.¹⁷⁸ Commentators have concluded that if this case were to be granted an appeal to the Court of Appeals for the Third Circuit, CIPA would likely fail constitutional scrutiny because the filtering technology does not work as it is intended.¹⁷⁹

D. Future Challenges For Congress

There is much to learn from Congress' failed

legislative attempts at regulating the Internet.¹⁸⁰ Foremost, Congress should realize that the Internet poses unique challenges to lawmakers that cannot be "addressed with knee-jerk legislation such as the CDA, [COPA], and CIPA."¹⁸¹ In response to public outcry that the Internet was becoming a dangerous place for our country's youth, Congress ignored constitutional precedent and created the most politically expedient solution in each legislative attempt.¹⁸² The consequence of these actions was "high political theater, but no law."¹⁸³ Undoubtedly, there is a basic tension between politics and the Constitution: no soundbite answer passes constitutional muster, but politics and politicians still demand soundbite answers.¹⁸⁴ Thus, as the country is faced with this ripe political issue, Congress' challenge for the future is not to simply pass more unconstitutional legislation in order to provide an immediate response, but rather to address the problem with a legislative solution that is politically appealing, practical, effective, and constitutionally sound.¹⁸⁵ The concept of drafting legislation that protects both our children and the First Amendment is not unrealistic if Congress chooses to follow three guidelines. First, Congressional legislation of any kind should not be an effort to "get around" the Supreme Court's decisions, but rather to "work within" the limits set by the Court.¹⁸⁶ Second, Congress needs to ensure that, in addition to

¹⁷³ *Id.* at 1016 n.206 (reporting that the American Library Association has opposed filtering programs). "As early as 1998 . . . when Senator John McCain introduced the 'School Filtering Act,' the American Library Association spearheaded the opposition to the bill because it believes that schools and libraries should make their own choices about which websites are acceptable and whether the filtering needs to occur at all." *Id.*

¹⁷⁴ *See* American Library Ass'n, Inc. v. United States, 201 F. Supp. 2d 401 (E.D. Pa. 2002).

¹⁷⁵ Kriegar, *supra* note 137, at 24 (reporting the Court ruled that, because of the problems with vagueness and overbreadth, CIPA was deemed to have not been narrowly tailored to address the government's interest in regulating content on the Internet).

¹⁷⁶ *American Library Ass'n, Inc.*, 201 F. Supp. 2d at 401.

¹⁷⁷ Alexander, *supra* note 6, at 1018 (implying that even if "technological advances can combat the problem of overblocking, keyword filtering has another drawback: it only screens for text. To be completely effective it must check for images as well.").

¹⁷⁸ Doherty, *supra* note 4, at 297 (stating that the software cannot block every questionable site, and as a result, a determined child could bypass the filter and find indecency on the Internet). "Like anything else in the technological world, these software programs are not perfect." *Id.*

¹⁷⁹ *Id.* (commenting that while in theory filters are an

excellent idea, it remains difficult to put theory into practice).

¹⁸⁰ Statement of Senator Patrick Leahy, Committee on Senate Judiciary, Hearing on "Stopping Child Pornography: Protecting Our Children and The First Amendment" (Oct. 2, 2002) [hereinafter *Stopping Child Pornography Statement*] (on file with author) (stating efforts by Congress in the past, such as the CDA and COPA, have violated constitutional limits and have been nullified by the courts). "Each time the Supreme Court has faced this task, it has provided valuable guidance to the Congress that we should heed." *Id.*

¹⁸¹ Kriegar, *supra* note 137, at 25.

¹⁸² Alexander, *supra* note 6, at 984, 994 ("Few politicians are willing to stand up against a politically expedient bill because it is unconstitutional Politicians first support solutions/bills that are politically appealing, then those which are politically viable, but they consider constitutionality most often as an afterthought.").

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 979.

¹⁸⁵ *Id.* at 995.

¹⁸⁶ 148 CONG. REC. §4391-01 (Daily Ed. May 15, 2002) (statement of Sen. Patrick Leahy of the Senate Judiciary Committee on introduction of the Hatch-Leahy "PROTECT ACT" of 2002). Senator Leahy stated that as a former prosecutor, "I am more interested in making real cases that protect children than making new First Amendment law. Every-

working within constitutional structure, the proposed bill sets up proper parties to effectively *enforce* and *prosecute* the new provisions.¹⁸⁷ Finally, as the Internet continues to thrive, it is imperative that Congressional regulations “[do] not stifle, but embrace, freedom of expression.”¹⁸⁸ The following sections will outline how the Department of Justice’s (“DOJ”) recent mandate over online obscenity continues to ignore constitutional precedent. Further, the comment will address how Congress, in its capacity as a rulemaker, can follow the previous three guidelines to draft legislation that allows the DOJ and FCC to work together to fight the problem of obscenity on the Internet.

VI. THE DEPARTMENT OF JUSTICE’S ACTION PLAN

A. Federal Prosecutor’s Obscenity Symposium

On June 6, 2002, the Executive Office of the United States Attorneys sponsored a Federal Prosecutors’ Obscenity Symposium which provided a forum for U.S. Attorneys to discuss the current state of the pornography industry and the legal challenges of investigating and prosecuting online obscenity.¹⁸⁹ Attorney General John Ashcroft

began the symposium by announcing that the Department of Justice had done little to combat the growing outbreak of online obscenity over the past decade.¹⁹⁰ The symposium brought together members of government agencies, interest groups, and lawyers to devise a “common and coordinated approach to the prosecution of obscenity providers.”¹⁹¹ At the symposium, Ashcroft asserted the importance of the public’s interests “in the quality of life,” and the “right of the Nation and the States to maintain a decent society.”¹⁹² It was with these public interests in mind that Ashcroft announced the first steps in the Justice Department’s plan to fight online obscenity. First, the Child Exploitation and Obscenity Section (“CEOS”) of the Department of Justice was granted an additional one million dollars in resources to hire five information technology experts and two additional prosecutors.¹⁹³ Second, the Attorney General Advisory Committee revised the U.S. Attorneys’ manual to eliminate the “lockout” provision.¹⁹⁴ Since 1998, CEOS was required to seek the approval of the local U.S. Attorney before commencing any investigation in any specific district.¹⁹⁵ Now, CEOS can investigate locally with only a notification of the need to do so to the U.S. Attorney in whose district the investigation is conducted.¹⁹⁶ Third, according to the recently

one wants to protect our children, but we need to do it with cases and laws that don’t get tossed out in court. It is tempting to rush to some ‘quick fix,’ but we owe our children more than just a press conference on this matter. We owe them careful and thoughtful action.” *Id.*

¹⁸⁷ *Id.* at §§4392-4393.

¹⁸⁸ Kriegar, *supra* note 137, at 25 (discussing the vast possibilities Congress has before it to regulate the Internet’s content). “Whatever the choice, it is paramount that the Internet continue as a robust source of information and that any content-based regulation must be carefully tailored to address the specific harm for which it is intended.” *Id.*

¹⁸⁹ Jay Sekulow, Bruce Taylor & Donna Rice Hughes, *Steps in the Right Direction to Combat Online Obscenity*, The American Center for Law and Justice Newsletter, at <http://www.aclj.org> (last modified July 19, 2002) [hereinafter *Sekulow*].

¹⁹⁰ Statement by Attorney General John Ashcroft, Pornography Victims Awareness Month, Department of Justice (May 1, 2001) (on file with author) (stating in the year 2002, the Department of Justice has made significant progress toward increasing adult obscenity prosecution). “This Department is dedicated to vigorously enforcing the laws of the United States, and those who illegally distribute obscene material will be prosecuted aggressively.” *Id.*

¹⁹¹ See *id.* Attorney General John Ashcroft opened the symposium by welcoming members outside the Justice Department who were present to support the DOJ’s mission to “combat the proliferation of obscenity in our society.” See

Ashcroft Memo, *supra* note 1. These members included Steve Takeshita, Organized Crime and Vice Division of the Los Angeles Police Department; Ray Smith, Postal Inspector; Jay Sekulow, Chief Counsel for the American Center for Law and Justice; Bruce Taylor, President and Chief Counsel for the National Law Center for Children and Families; and Donna Rice Hughes, author of *Kids Online: Protecting Your Children in Cyberspace*. *Id.*

¹⁹² See Obenberger, *supra* note 5 (reporting the Attorney General observed that obscenity has tremendous consequences for our broader society). “[C]linical and experimental evidence show a correlation between exposure to sexually violent materials and an increase in aggressive behavior towards women.” *Id.*

¹⁹³ Ashcroft Memo, *supra* note 1.

¹⁹⁴ *Id.*

¹⁹⁵ See Obenberger, *supra* note 5 (declaring the main point of the lockout provision was that a local U.S. Attorney was best prepared to know what kinds of material were convictable obscenity under local standards and therefore best equipped to determine which investigations would be a waste of time); see also Ashcroft Memo, *supra* note 1 (stating the lockout provision impeded the Department of Justice’s efforts to prosecute obscenity cases). At the recommendation of the Advisory Committee, Ashcroft approved this change in the manual in April 2002. *Id.*

¹⁹⁶ Ashcroft Memo, *supra* note 1 (stating that the elimination of the lockout provision should not be interpreted as an indication that CEOS will be the sole prosecutor of ob-

updated CEOS website, the Justice Department is recommending a variety of filter programs to prevent child access to pornographic content.¹⁹⁷

Finally, the Justice Department's proposal supports the implementation of the Child Obscenity and Pornography Prevention Act of 2002 ("COPPA").¹⁹⁸ On April 16, 2002, the Supreme Court ruled that the current ban of "virtual" child pornography and pandering of child pornography is unconstitutional in *Ashcroft v. Free Speech Coalition*.¹⁹⁹ In *Free Speech*, the majority, by a 7-2 vote, held that a provision in the 1996 Child Pornography Prevention Act ("CPPA") violated the First Amendment because the statute's definition of "child pornography" was overbroad.²⁰⁰ The majority held that the CPPA would have criminalized such non-obscene depictions of minors engaged in sexual activities such as *Romeo and Juliet*, *Traffic*, and *Lolita*. Therefore, the Court rejected the statute because it banned both obscene and constitutionally protected speech alike.²⁰¹ The COPPA represents new legislation supported by the Justice Department that reaffirms the 1996 ban on so-called "virtual" child pornography.²⁰²

It is clear that the Attorney General is aware that the possibility of completely eliminating the online obscenity problem is unrealistic.²⁰³ Ashcroft stated his realistic goal at the end of the Symposium: "[a]ny plan to combat obscenity must begin with the realization that the primary goal is deterrence, born of a well coordinated and well

executed strategy [W]e can and we will change the pattern of behavior by aggressive law enforcement."²⁰⁴ But how well coordinated and well executed is Ashcroft's strategy?

B. Challenging the DOJ Plan

The Justice Department's plan to attack and prosecute distributors of online obscenity in essence mirrors the strategy Congress used when drafting the CDA, COPA, and CIPA.²⁰⁵ Senator Patrick Leahy made a statement on child pornography in front of the Senate Judiciary Committee on October 2, 2002.²⁰⁶ Leahy acknowledged that the Justice Department has the same goals as Congress—"we are all against child pornography—that vote would be an easy one."²⁰⁷ But unlike the Department of Justice, Leahy declared that Congress was concerned about finding legislative solutions that not only made politicians look tough on online obscenity, but that could also withstand "the test of time and the scrutiny of the courts."²⁰⁸ Senator Leahy recognized that, in order for government efforts to survive, such efforts need to strongly consider the standards that have been set out repeatedly by the U.S. Supreme Court.²⁰⁹ Leahy described the Justice Department's plan as just another "quick fix" that does not pay attention to constitutional limits.²¹⁰

There are several aspects of the Justice Department's attack on online obscenity plan that are

scenity cases). According to the Attorney General, the prosecution of obscenity cases will be a collaborative effort between CEOS and the U.S. Attorneys' offices. *Id.*

¹⁹⁷ See Child Exploitation and Obscenity Section, Department of Justice, Criminal Division, at <http://www.usdoj.gov/criminal/ceos/obscenity.htm> (last modified June 27, 2002) (reporting that the Department of Justice is committed to taking various approaches to limit online obscenity). The CEOS website suggests the use of commercially available software "filter" programs to prevent access to websites containing offensive content. *Id.*

¹⁹⁸ See Child Obscenity and Pornography Prevention Act of 2002, H.R. 4623, 107th Cong. (2002), at <http://www.house.gov/cannon/bills2001/hr4623.htm> (last visited Sept. 5, 2003).

¹⁹⁹ 535 U.S. 234 (2002) (holding that a provision in the CPPA which banned virtual child pornography—that is, child pornography made with morphed computer images or without using real children—was unconstitutional because it violated the First Amendment).

²⁰⁰ *Id.*

²⁰¹ *Id.* at 1401. The Court also held that the COPPA was unconstitutional for covering a broad array of pornographic material involving computer-generated images or youthful-looking adults instead of actual children engaged in sexual

activities. *Id.*

²⁰² See Press Release, Office of Congressman Chris Cannon, Cannon Introduces Legislation to Protect Children Child Pornography Banned In New Bill, at <http://www.house.gov/cannon/press2002/may02.htm> (last modified May 2, 2002).

²⁰³ Sekulow, *supra* note 189.

²⁰⁴ *Id.*

²⁰⁵ *Stopping Child Pornography Statement*, *supra* note 180 ("Everyone wants to protect our children, but we need to do it with laws . . . that stick.").

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* ("We need a law with teeth, but not one with false teeth.").

²⁰⁹ *Id.* ("We should not have been surprised on this Committee [that previous attempts at legislation] were unconstitutional. Now, with varying legislative proposals before us, we must work together to not repeat our earlier mistakes.").

²¹⁰ *Id.* (commenting that Leahy reported that after conferring with Constitutional law experts and law professors on the matter, they confirmed that the Justice Department's proposal will not pass the Supreme Court's First Amendment scrutiny).

problematic. First, as this comment has already addressed, filtering programs have been widely regarded as considerably lacking.²¹¹ That the Justice Department ignores this obvious criticism represents a general lack of initiative on its part to explore different ways to screen websites from children.²¹² In addition, the Justice Department's plan to eliminate the "lockout" provision and allow any U.S. Attorney the ability to investigate locally in any jurisdiction without seeking the approval of the local U.S. Attorney is simply an example of recipient jurisdiction. This comment has already confirmed that this method would cause a substantial chilling effect on the expression of ideas on the Internet.²¹³ If each cyberspace user must govern his speech in accordance with all possible local communities, then much will remain unexpressed online for fear of being prosecuted by a U.S. Attorney in some "recipient's jurisdiction." In such a case, the free flow of ideas on the Internet will largely be impaired.²¹⁴

Finally, Senator Leahy, in his statement to the Senate Judiciary Committee on Child Pornography, discussed the three most problematic aspects of the Justice Department's COPPA proposal.²¹⁵ First, its most glaring omission is that it fails to incorporate the Supreme Court's doctrine of obscenity into the definition of "child pornography."²¹⁶ The problem with this approach is that it is essentially the same one taken by Congress in the CPPA, which was invalidated by the Supreme Court because the proper terminology was neglected.²¹⁷ As it stands, the Department's proposal will simply result in another round of cases challenging the law and ultimately will be thrown out by the Supreme Court for the same reasons.²¹⁸ Thus, the main problem with the Department's

proposal is that, in avoiding the parameters set out by the Supreme Court, the COPPA amounts to the same "political sound bite" legislation that was drafted by Congress and invalidated many times before.²¹⁹ For example, although a section in the COPPA is entitled "Obscene Visual Depictions of Young Children," the Department has avoided discussing the "obscenity" requirement established by *Miller v. California*.²²⁰ As Senator Leahy points out, "[h]eadlines and titles like 'prepubescent' and 'obscene' are popular, but will not fool our federal judges when there is no obscenity requirement in the statute itself, [but] only in the title."²²¹ Finally, the proposed statute contains no requirement that the material be judged "as a whole for artistic, literary, or scientific value," which was an essential issue in the Supreme Court's invalidation of the CPPA in *Free Speech*.²²² Ultimately, the proposed provisions of the COPPA, according to Senator Leahy, invite "a parade of legitimate movies and scientific or educational materials that may be covered by the overbreadth of the provision to challenge the legislation."²²³ Based on this review, it is clear that the Department of Justice's plan to aggressively attack online obscenity represents a similar approach to Congress' failed legislation, and therefore another method of regulation is clearly needed.

VII. THE EXPERT AGENCY

A. Is Regulation Even Possible?

Many have argued that a regulatory scheme designed to prevent obscenity from being disseminated over the Internet simply is not possible.²²⁴

²¹¹ See generally Jon Bigness, *Sifting Problems of Web Filters*, CHI. TRIB., Feb. 16, 1998, at 1 (reporting that filtering software effectiveness depends in large part on the sensitivity of the software publishers to obscene material because they ultimately choose which sites are inappropriate for children).

²¹² This comment will explore in greater detail how the FCC can pursue some of these more unique alternatives to filtering programs. See, e.g., Section VII, Part B.

²¹³ See *infra* Section III, Part C.

²¹⁴ See Erik G. Swenson, *Redefining Community Standards in Light of the Geographic Limitless of the Internet: A Critique of United States v. Thomas*, 82 MINN. L. REV. 855 (1998).

²¹⁵ *Stopping Child Pornography Statement*, *supra* note 180.

²¹⁶ *Id.* ("Not even one provision takes that approach, which would at least ensure that some of the law was upheld [when reviewed by the Supreme Court].").

²¹⁷ *Free Speech Coalition*, 535 U.S. 234 ("The CPPA, how-

ever, extends to images that appear to depict a minor engaging in sexually explicit activity without regard to the *Miller* requirements.").

²¹⁸ *Stopping Child Pornography Statement*, *supra* note 180 ("America's children deserve . . . a good faith . . . effort to come up with a law that will survive judicial scrutiny and protect them for years to come.").

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Free Speech Coalition*, 535 U.S. 234.

²²³ *Stopping Child Pornography Statement*, *supra* note 180.

²²⁴ See Leonard J. Kennedy & Lori A. Zallaps, *If It Ain't Broke . . . The FCC And Internet Regulation*, 7 COMM'LAW CON-SPECTUS 17 (1999) [hereinafter Kennedy].

Proponents of an unregulated Internet contend that the Internet is too large and complex, and any attempt to control its content would be futile.²²⁵ Therefore, a threshold question needs to be answered: is regulation of obscenity online even possible? According to many legal commentators, a regime that regulates online obscenity makes a great deal of sense and, under the right circumstances, may indeed be possible.²²⁶

The FCC is a service-based organization,²²⁷ and as such, its regulatory philosophy is simple: the agency must follow the laws that Congress passes.²²⁸ Thus, before detailing how the FCC can help regulate obscene content, it is necessary to first address how Congress should amend its past mistakes and draft lasting legislation. First, the regulation must be clear and narrow.²²⁹ Congress has fallen victim to vagueness and overbreadth in the past in attempting to wipe out all sexually explicit and obscene communication on the Internet.²³⁰

Next, Congress needs to consider how liability is going to be extended to the distributor of the obscene material. As this comment has illustrated, efforts to impose the "contemporary community standards" in the *Miller* test to a virtual world are arguably outdated.²³¹ Congress should establish a "virtual community standard" because the Internet is a non-physical space that acts as the primary community to its users.²³² The two keys to this standard are notice and accountability.²³³ When Congress answers the specific questions required to set up a "virtual community standard," potential distributors of obscene or indecent material will know exactly what standards will be used to judge their actions, as well as exactly which ju-

risdictions they are to be held accountable.²³⁴

Finally, Congress must realize that complete bans on content have never been acceptable, and thus the legislature needs to consider how to effectively control the distribution of obscene materials online.²³⁵ There is essentially no constitutional problem with banning materials online that are by definition "obscene," because these materials do not receive any constitutional protection regardless of whether they are on the Internet or anywhere else.²³⁶ However, when Congress considers drafting legislation that extends beyond the "obscene," to include "indecent," "offensive," or "lewd" content, they run the risk of being unconstitutionally vague or overbroad by prohibiting protected speech.²³⁷ Consequently, Congress needs to establish a precise government objective.²³⁸ In this case, as the Department of Justice has asserted, their strongest justification for regulation is the protection of children from harmful materials.²³⁹ Regulation designed to prevent child exploitation and victimization should not be declared unconstitutional because "solicitations to engage in unlawful activity are unprotected by the First Amendment, whether they occur on the Internet or anywhere else."²⁴⁰

However, it is when the government goes beyond "solicitation," and attempts to ban indecent content that it must be extremely cautious.²⁴¹ In attempting to regulate "indecent" speech, the question that needs to be considered in order to pass judicial scrutiny is whether the government has chosen the least restrictive means for achieving their stated goal of preventing child exploitation.²⁴² In drafting such legislation, Congress would bear the burden to prove that most existing

²²⁵ *Id.*

²²⁶ See Cass Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757, 1799 (1995); see also Angela E. Wu, *Spinning a Tighter Web: The First Amendment and Internet Regulation*, 17 N. ILL. U. L. REV. 263 (1997) (commenting on how sexually-explicit information should be regulated on the Internet).

²²⁷ Sunstein, *supra* note 226, at 1799.

²²⁸ See Kennedy, *supra* note 224, at 17 (discussing that the FCC needs to honor Congressional intent when positioned with the task of regulating obscenity on the Internet); see also 47 U.S.C. §230(b)(2) ("It is the policy of the United States to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.").

²²⁹ Kaplin, *supra* note 107, at 172.

²³⁰ Sunstein, *supra* note 226, at 1800.

²³¹ See *infra* Section III, Part C.

²³² Byassee, *supra* note 68, at 198-199.

²³³ Branscomb, *supra* note 80, at 1645 (noting that accountability refers to the acceptance of responsibility for one's actions and without it, there can be no basis upon which an injured party could ever seek relief).

²³⁴ Alexander, *supra* note 6, at 1010-1011.

²³⁵ Sunstein, *supra* note 226, at 1800.

²³⁶ *Miller*, 413 U.S. 15.

²³⁷ *Pacifica*, 438 U.S. at 729.

²³⁸ Kaplin, *supra* note 107, at 172.

²³⁹ Ashcroft Memo, *supra* note 1 (asserting that obscenity on the Internet can lead to child exploitation and sexual violence as child molesters often use obscene materials to seduce their prey by lowering the inhibitions of their victims).

²⁴⁰ Sunstein, *supra* note 226, at 1801.

²⁴¹ *Id.*

²⁴² Kaplin, *supra* note 107, at 172.

alternatives are not effective and therefore the ban on indecent speech is necessary to promote its goals. As one commentator put it:

[t]he impact of regulations like the CDA and COPA, complete with content-based restrictions and such vague words as 'indecent' and 'patently offensive,' is chilled speech. Regulations fail when the chilled speech is constitutional, when the speech outweighs the asserted compelling justifications for the regulations, and when the regulations are not narrowly tailored to meet these compelling justifications.²⁴³

While this kind of analysis hinges on technological advances, it is safe to assume that any complete ban on indecent speech would be found unconstitutional. This is so because alternatives, even if somewhat ineffective, will almost always exist.²⁴⁴ It is in this area that Congress may rely on the expertise of the FCC to merge the notions of technology and law to promote the government's interest in protecting children from obscene as well as indecent speech. The following is a brief analysis of the manner in which the FCC can use its expertise to test less onerous alternatives. If these methods prove to be effective, then Congress and the FCC can continue to work together to use the technology available to control the distribution of indecent content online. If these methods do not work, however, Congress will have at least met its burden in proving that the alternative options were not effective and, together with the FCC's assistance, ban indecent speech and enforce the law against those who violate it.

B. Defining the FCC's Role

1. Reach Out to Trade Organizations

Perhaps the most significant reason the FCC is most qualified to handle the merging of technology and cyberspace law is that it is the "expert agency" for dealing with both communications and new media.²⁴⁵ As stated, any regulation that

deals with content-based speech, like obscene and indecent speech, will have serious implications on the First Amendment.²⁴⁶ To answer the question of whether the government has shown the least restrictive alternative in pursuing its interest depends in large part on the state of the technology.²⁴⁷ As the technology continues to advance, an important factual question must be addressed periodically: what sorts of technological alternatives exist by which the government could utilize what represents a less onerous alternative than strictly banning indecent speech?²⁴⁸ The communications and new technology industries are very complex and highly technical. The FCC, as a "service-based" organization, has the ability to reach out to trade associations and consumer groups to compile the necessary data needed to make such an inquiry on a regular basis. The Internet continues to revolutionize the way we communicate, and only the FCC has the relevant expertise and daily industry contacts to ensure a close watch on the emerging technology.²⁴⁹

2. Complaints to FCC Website

If Congress were to narrowly tailor this new legislation aimed at regulating obscene and indecent speech on the Internet, they would need some practical way to locate this content online. The Internet and the online community continue to grow at an alarming rate.²⁵⁰ Beyond general enforcement, how can the FCC help Congress reach these obscene and indecent sites if the Internet is so seemingly infinite? Congress should use the FCC as a forum to entrust and empower those who confront these problems on a daily basis.²⁵¹ Any successful policy in regulating content on the Internet needs to start with a "bottom-up" approach that begins with parents, schools, and li-

²⁴³ Philip T.K. Daniel & Dr. Patrick Pauken, *The Electronic Media and School Violence: Lessons Learned and Issues Presented*, W. EDUC. L. REP. (June 20, 2002).

²⁴⁴ Kaplin, *supra* note 107, at 172.

²⁴⁵ See *In re Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, Separate Statement of Commissioner Michael Powell, *Memorandum Opinion and Order*, 13 F.C.C. Rcd. 18,025 (1998) (announcing that Congress gave broad authority to the FCC as an "expert agency" and thus Congress should rely on the FCC's "unique capabilities" on subjects related to communications).

²⁴⁶ *Id.*

²⁴⁷ Sunstein, *supra* note 226, at 1802.

²⁴⁸ Kaplin, *supra* note 107, at 172.

²⁴⁹ Krieger, *supra* note 137, at 23.

²⁵⁰ See Internet Software Consortium, *Internet Domain Survey*, at <http://www.isc.org/ds/WWW-200207/index.html> (last visited Sept. 10, 2003) (citing statistics that show that the number of Internet hosts as of July 2002 was up to 162,128,493).

²⁵¹ Alexander, *supra* note 6, at 1023 ("Parents in the home need to be both educated and empowered; school officials must be given support and tools; local libraries must be encouraged to develop successful policies and acquire innovative tools.").

braries at the local level, not in Washington.²⁵² The FCC can help empower those who confront this content most often by providing a forum in which they can report what they find on the Internet. Under an enforcement link on their website, the FCC could create a report form that allows an individual to register what they think may be an offending website. These reports could provide a convenient means for the individual to electronically send the FCC the offending website, and check off criteria listed on the form to identify what appears to be either obscene or indecent. In addition to providing these reports, the FCC could provide on their website a practical explanation of the law as well as a "Parent's Guide to Internet Safety," similar to the brochure published by the FBI, which contains tips on recognizing and correcting problems, law enforcement information, and other resources.²⁵³ In handling these complaints, the FCC could determine whether the offending website actually does violate Congress' laws. If the FCC decides that the site merits further investigation by law enforcement officials, it can refer the information that it has collected to an appropriate U.S. Attorney to initiate prosecution.

One of the challenges for Congress has always been to avoid the symbolic "top-down" approach and instead address the problem practically, by starting from the bottom and putting some responsibility in the hands of members of local communities—such as, parents, schools, and libraries.²⁵⁴ With this approach, Congress' goal of protecting children is much more likely to be effective because it allows everyone, not just lawmakers, to get involved and join in the fight against online obscenity. And the FCC, as the government's expert communications agency, provides an ideal forum to start such an initiative.

3. *Cyber-zoning and Website Rating*

Congress should encourage citizens at the local community level to participate in the fight against obscenity on the Internet, but obviously it should not rely solely on such efforts of local self-regulation to solve the problem alone.²⁵⁵ Another system that Congress and the FCC could encourage would be a program deploying website ratings and "cyber-zoning."²⁵⁶ While the government would not be able to mandate such a solution, it could offer federal incentives to website hosts that encourage a voluntary rating system similar to the one the Motion Picture Association of America uses to rate its movies.²⁵⁷ Although getting web hosts to sign a voluntary agreement might prove challenging, if the federal incentives were appealing enough, the FCC could play a large role in federalizing filter programs. Instead of attempting to sort content by language, which has proven ineffective, a filtering program would instead filter only certain indecent websites that possess constitutionally protected speech, but are rated as such so that children could not be able to access them online using the software.²⁵⁸

An effective system of web rating and filtering could lead to a time when Congress and the FCC could facilitate a program of "cyber-zoning." In light of the fact that the Supreme Court has permitted zoning ordinances that isolated the location of adult-oriented businesses to stand,²⁵⁹ it might be possible to "cyber-zone" pornography and other indecent content through a ".xxx" domain name.²⁶⁰ If the system proved effective, other top-level domain names like "adult," or "kids" would allow for much easier screening and limit the potential of children inadvertently accessing indecent websites.²⁶¹

²⁵² See Federal Bureau of Investigation, *A Parent's Guide to Internet Safety*, at <http://www.fbi.gov/publications/pguide/pguide.htm> (last visited Sept. 10, 2003).

²⁵³ *Id.*

²⁵⁴ Alexander, *supra* note 6, at 1030 ("If Congress truly cares about doing something, they should entrust and empower local communities.").

²⁵⁵ *Id.*

²⁵⁶ O'Rourke, *supra* note 17, at 701.

²⁵⁷ Alexander, *supra* note 6, at 1029 (acknowledging that such a voluntary rating system might be difficult because most individuals would be hesitant to sign a voluntary agreement).

²⁵⁸ See Jonathan Weinberg, *Rating the Net*, 19 HASTINGS COMM. & ENT. L.J. 453 (1997) (commenting that with the

proper blocking technology, like websites with ratings, filter programs could be very accurate).

²⁵⁹ See *City of Renton v. Playtime Theatres*, 475 U.S. 41 (1986) (finding a zoning ordinance prohibiting adult theatres from moving within 1,000 square feet of residential areas constitutional because the ordinance was designed to prevent crime, protect city's retail, and maintain property values).

²⁶⁰ *Id.*

²⁶¹ Kriegar, *supra* note 137, at 25 n.35 (reporting that in 2000, the Internet Corporation for Assigned Names and Numbers ("ICANN") approved the addition of seven domain names: ".aero," ".biz," ".coop," ".info," ".museum," ".name," and ".pro").

VIII. CONCLUSION: WHY IS THIS IN THE "PUBLIC INTEREST?"

The rulemaking and enforcement powers and duties of the Federal Communication Commission are always subject to "the public interest test." This test dictates that, from time to time, as "public convenience, interest, or necessity requires," the Commission may make and enforce rules that are not inconsistent with the Act.²⁶² How can one determine whether the regulation of online obscenity and indecency is within the public interest? The consideration of a highly publicized case involving cyberporn lends much insight. A student at the University of Michigan is alleged to have written and distributed a fictitious story involving another student at the University. In this story, where the subject character was explicitly named, the student was raped, tortured, and finally killed. The story is obscene, violent, and threatening—and moreover, it is disseminated over the Internet.²⁶³ It is time for Congress and

the FCC to work together to create federal law that provides the means to regulate this kind of speech on the Internet and enforce such regulation against those who violate the law.²⁶⁴ Public officials and lawmakers alike have all determined that it is within the public interest to criminalize those that disseminate obscene content on the Internet.

The central point of this comment has been that the Internet need not be, as Attorney General Ashcroft referred to it, a "double-edge sword."²⁶⁵ Congress and the Department of Justice must accept that the online obscenity problem deserves more than a "quick fix" and that politically expedient answers simply will not work anymore. If Congress relied on the FCC to assist them in enforcing lasting legislation that criminalizes obscenity online, then the uninhibited free expression of constitutionally protected speech could continue to thrive on the Internet.

²⁶² 47 U.S.C. §303(r).

²⁶³ See Sunstein, *supra* note 226, at 1799 (inquiring as to which current federal law would apply to this conduct and if there should be new federal online regulatory law that would provide a cause of action); see also Peter H. Lewis, *Writer Ar-*

rested After Sending Violent Fiction Over Internet, N.Y. , Feb. 11, 1995, at A10.

²⁶⁴ Sunstein, *supra* note 226, at 1800.

²⁶⁵ Ashcroft Memo, *supra* note 1.

